

August 12, 2004

**UNITED CITIES GAS COMPANY, a Division of
ATMOS ENERGY CORPORATION
INCENTIVE PLAN ACCOUNT (IPA) AUDIT
AND
PETITION OF UNITED CITIES GAS COMPANY
TO AMEND THE PERFORMANCE BASED
RATEMAKING MECHANISM RIDER TO ITS TARIFF**

DOCKET NO.
01-00704

**ORDER GRANTING IN PART AND DENYING IN PART CONSUMER
ADVOCATE'S RENEWED MOTION TO SUMMARILY DENY MOTION TO
APPROVE SETTLEMENT AGREEMENT AND ALTERNATIVELY TO TREAT
THE MOTION AS A MOTION FOR SUMMARY JUDGMENT AND DENYING
MOTION TO APPROVE SETTLEMENT AGREEMENT**

This matter came before the Hearing Officer upon the *Consumer Advocate's Renewed Motion to Summarily Deny Motion to Approve Settlement and Alternatively to Treat the Motion as a Motion for Summary Judgment* ("Renewed Motion")¹ filed by the Consumer Advocate and Protection Division ("Consumer Advocate") on June 3, 2004. Staff of the Energy and Water Division of the Tennessee Regulatory Authority ("Staff") filed *Energy and Water Division Staff's Response to Consumer Advocate's Renewed*

¹ The *Renewed Motion* incorporates by reference the *Consumer Advocate's Objection to the Motion for Approval of Settlement Agreement Filed by Atmos Energy Corporation and the Staff of the Tennessee Regulatory Authority*, pp 1-6 (May 17, 2004) and *The Consumer Advocate Division's Reply Opposing Approval of the Proposed Settlement*, pp 1-2 (May 28, 2004) See *Consumer Advocate's Renewed Motion to Summarily Deny Motion to Approve Settlement and Alternatively to Treat the Motion as a Motion for Summary Judgment*, pp 1-2 (June 3, 2004) By disposition of the *Renewed Motion*, the Hearing Officer is also disposing of the previous requests for dismissal incorporated therein

Motion to Summarily Deny Motion to Approve Settlement and Alternatively to Treat the Motion as a Motion for Summary Judgment ("Response") on June 7, 2004. United Cities Gas Company ("Atmos Energy Corporation" or "Atmos") did not file a response to the Consumer Advocate's *Renewed Motion*, but adopted the Staff's *Response* orally on June 8, 2004.²

In the *Renewed Motion*, the Consumer Advocate urges denial of the *Motion to Consolidate and for Approval of Settlement Agreement* (hereinafter "*Motion to Approve Settlement Agreement*")³ on the basis that, because of the Consumer Advocate's opposition, not all parties have agreed to the proposed settlement. In its *Response*, Staff argues that this case is distinguishable from a settlement where all three parties have joined in the presentation of a settlement agreement for consideration by the Authority because Staff and Atmos are merely signaling to the Authority that they have settled their differences and seek approval of a petition through a contested case proceeding. Because of this distinction, Staff urges denial of the *Renewed Motion*.

Findings and Conclusions

After due consideration of the arguments presented by Atmos, the Consumer Advocate and Staff, the Hearing Officer makes the following findings:

Staff and Atmos are parties to this proceeding. By virtue of the granting of the request for intervention by the voting Panel on April 30, 2002, the Consumer Advocate is

² Transcript of Proceedings, pp. 3-4 (June 8, 2004)

³ By agreement of the Parties, the issue of consolidation of the dockets was separated from the issue of approval of the proposed settlement agreement and consolidation was granted at the Status Conference on April 22, 2004. See *Order Granting Motion to Consolidate and to Approve Settlement Agreement in Part, Granting Motion for Extension of Time to Respond in Part, and Setting Procedural Schedule* (April 28, 2004). Therefore, to indicate more accurately the remaining issue to be determined in the motion, the *Motion to Consolidate and for Approval of Settlement Agreement* will be referred to as the "*Motion to Approve Settlement Agreement*" in this Order.

a party to this proceeding. The Consumer Advocate as a party has not consented to the proposed settlement agreement in this case.

In *Harbour v. Brown*, 732 S.W.2d 598 (Tenn. 1987), the Tennessee Supreme Court held that a valid consent judgment cannot be entered by a court when one party withdraws his consent and this fact is communicated to the court prior to the entry of the judgment. The Court has further stated that a valid consent judgment cannot be rendered by a court when the consent of one of the parties thereto is wanting.⁴

Staff and Atmos in the *Motion to Approve Settlement Agreement* filed on March 8, 2004 requested approval of the Settlement Agreement by the Authority at the March 22, 2004 Authority Conference. This request renders the settlement a joint presentation of a settlement agreement for consideration by the Authority, rather than a signal to the Authority that the parties have settled their differences and seek approval of a petition through a contested case proceeding.

Therefore, based upon the principles stated in the holding of the Tennessee Supreme Court in *Harbour v. Brown*, the Hearing Officer concludes that the proposed settlement agreement cannot be approved absent the consent of all parties to that agreement. Because the Consumer Advocate is a party and has not consented to the proposed settlement, the *Renewed Motion* is granted to the extent that the *Motion for Approval of Settlement Agreement* cannot be approved and therefore must be denied. Further, because the Consumer Advocate is a party and has not consented to the proposed settlement agreement, the *Motion to Approve Settlement Agreement* must be denied. The Consumer Advocate's alternate request to treat the *Motion for Approval of Settlement*

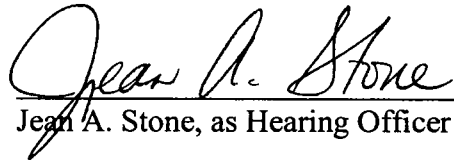
⁴ *Harbour v. Brown*, 732 S W 2d 598, 599 (Tenn 1987)

Agreement as a motion for summary judgment is rendered moot by the granting of summary denial of that motion and, therefore, is denied.

IT IS THEREFORE ORDERED THAT:

1. The *Consumer Advocate's Renewed Motion to Summarily Deny Motion to Approve Settlement and Alternatively to Treat the Motion as a Motion for Summary Judgment* filed on June 3, 2004 is granted in part only as to the summary denial of the motion to approve the settlement agreement. Accordingly, the alternate motion to treat the motion to approve the settlement agreement as a motion for summary judgment is rendered moot and therefore is denied; and

2. The *Motion to Approve Settlement Agreement* filed on March 8, 2004 is denied.


Jean A. Stone, as Hearing Officer